

ORDINANCE NO. 07-2011

AN ORDINANCE OF THE TOWN COMMISSION OF THE TOWN OF LAKE PARK, FLORIDA, DECLARING ZONING IN PROGRESS AND A MORATORIUM AS TO THE FILING AND/OR RECEIVING OF ANY PETITION FOR THE ESTABLISHMENT OF ADULT ARCADES OR INTERNET CAFÉ USES WITHIN THE TOWN; PROVIDING THAT ZONING IN PROGRESS AND THE MORATORIUM SHALL BE IN EFFECT FOR A PERIOD WHICH SHALL TERMINATE ON THE EFFECTIVE DATE OF THE TOWN'S ADOPTION OF LAND DEVELOPMENT REGULATIONS TO REGULATE THE USE OF ADULT ARCADES OR INTERNET CAFES; PROVIDING FOR LEGISLATIVE FINDINGS, INTENT AND PURPOSE; PROVIDING FOR A DEFINITION OF THE USE OF ADULT ARCADES OR INTERNET CAFES FOR THE PURPOSES OF THIS ORDINANCE; PROVIDING FOR THE BOUNDARIES SUBJECT TO THE MORATORIUM; PROVIDING FOR SEVERABILITY; PROVIDING FOR THE REPEAL OF LAWS IN CONFLICT; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, this moratorium or zoning in progress ordinance is being enacted to provide the Town staff with sufficient time to evaluate the use commonly referred to as Adult Arcades or Internet Cafes; and

WHEREAS, after evaluation of the uses referred to hereinabove, town staff may deem it appropriated to develop land development regulations to define the use of "adult arcade" or "internet café" and to specify particular zoning districts where said uses may operate either as uses by right or as special exception uses; and

WHEREAS, although these proposed uses have become popular throughout south Florida, and the United States, but depending on how they are operated may be classified by Florida statutes as a type of "gambling" which is prohibited; and

WHEREAS, the Town Commission has recently been made aware of articles reporting that two of its neighboring municipalities the Village of North Palm Beach and the Town of Juno Beach are adopting moratoriums due to concerns that operators of "adult arcades or internet cafes" may be seeking to open such facilities in their respective municipalities; and

WHEREAS, some adult arcades or internet cafes may be operating using tokens or coded cards which activate games of chance; and

WHEREAS, pursuant to section 849.15, Florida Statutes, no entity can lawfully possess or permit the operation of a slot machine or other device that would fit the definition of section 849.16, Florida Statutes, as follows:

Any machine or device is a slot machine or device within the provisions of this chapter if it is one that is adapted for use in such a way that, as a result of the insertion of any piece of money, coin, or other object, such machine or device is caused to operate or may be operated and if the user, by reason of any element of chance or of any other outcome of such operation unpredictable by him or her, may:

- (a) Receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value or which may be given in trade.

WHEREAS, court decisions and attorney general opinions which have evaluated a set of facts involving Adult Arcades with slot machines or the Internet Cafes which use encoded cards with a cash value have determined said uses to be contrary to Florida law; and

WHEREAS, the Town Commission hereby directs its staff to analyze the effects and impacts created by adult arcades/internet cafes in the Town, to analyze whether these uses are permissible, and whether, if permissible certain standards should be incorporated into the Town's land development regulations and to further and promote the public health, safety, morals and general welfare; and

WHEREAS, the Town Commission finds and declares a need to declare "zoning in progress" and to temporarily suspend the issuance of any development permits, business tax receipts, the renewal thereof, or other approvals pertaining to adult arcades or internet cafes within the Town until such time as the Town can review its land development regulations.

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COMMISSION OF THE TOWN OF LAKE PARK, FLORIDA AS FOLLOWS:

SECTION 1: Legislative Findings, Intent and Purpose. The Whereas clauses are incorporated herein, are true and correct, and represent the legislative findings of the Town Commission. It is the purpose and intent of this Ordinance to promote the health, safety, morals, and general welfare of the residents and businesses of the Town through the analysis of any impacts from adult arcades or internet cafes and whether such uses are legal and, if so, can be appropriately located within the Town.

SECTION 2: Definition. For purposes of this Ordinance, the definition of adult arcades or internet cafes shall be: "Facilities which contain "slot" or other machines which patrons of the facility activate by inserting a token or coin, press a button or symbol, pull a lever; or utilize a card (similar to a plastic credit card) to access the Internet to play a game of chance whereby the player may win something of value, or which can be exchanged for value. The application of this definition is not intended to be strictly as to any particular facility. Rather, the application of this definition shall be subject to interpretation by the Community Development Director in consultation with the Town Attorney.

SECTION 3: Boundaries. This Ordinance shall apply to all properties located within the boundaries of the Town of Lake Park.

SECTION 4: Zoning in Progress and Moratorium Declared. The Town Commission hereby imposes zoning in progress and a moratorium upon the application of any development permits, business tax receipts, or renewal thereof, or other approvals for adult arcades or internet cafes, as such terms are defined herein and interpreted by the Community Development Director or Town Attorney within the Town.

SECTION 5. Repeal of laws in conflict. All Ordinances or parts of Ordinances in conflict herewith are hereby repealed to the extent of such conflict.

SECTION 6. Severability. If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof.

SECTION 7. Effective Date. This Ordinance shall take effect immediately upon adoption.

**JONES
FOSTER
JOHNSTON
& STUBBS, P.A.**

Attorneys and Counselors

Memo

To: Maria Davis, Town Manager
From: Thomas J. Baird, Town Attorney
Date: September 14, 2011
Subject: Adult Arcades / Internet Cafes

Question Presented

Vice Mayor Rumsey has requested information concerning adult arcades, also known as Internet Cafes. There was also an article in Tuesday's Palm Beach Post regarding Internet cafes and articles reporting that the Village of North Palm Beach and the Town of Juno Beach are adopting moratoriums to address recent proposals by operators of "adult arcades or internet cafes" (hereinafter "arcades") who may be seeking to open such facilities in these communities.

Discussion

The moratoriums are being enacted to give municipalities time to develop land development regulations presumably to prohibit arcades as uses within their communities. These proposed arcades are popular throughout the United States, but some states classify these operations as "gambling" and prohibit them on that basis. Some arcades contain slot machines where tokens are used, but the Internet Café uses a card, similar to a credit card which can be "loaded" with money and used to access the internet games. An arcade contains machines which are "played" by patrons inserting tokens or cards into the machine. The card or token is for small amounts of money, usually less than a dollar, but can be for more than that. The player pulls the lever to the slot machine, or in the case of the internet games uses a mouse to click on the game to be played. The internet game is much the same as a slot machine, but it is a different forum. Playing the game by clicking on a symbol *may* lead to the player winning vouchers, tickets redeemable for drinks, food, or cash. This raises the question of whether the arcades are considered to be "gambling houses" under Florida law. If so

then the use is altogether prohibited under Florida law. Nevertheless, the enforcement of this activity has not, as yet, been vigorous.

As a general rule, section 849.01, Florida Statutes, prohibits anyone from keeping a gambling house.¹ Pursuant to section 849.15, Florida Statutes, no entity can lawfully possess or permit the operation of a slot machine or other device that would fit the definition of section 849.16, Florida Statutes. The latter section defines the machines that fall under the previous provisions as follows:

Any machine or device is a slot machine or device within the provisions of this chapter if it is one that is adapted for use in such a way that, as a result of the insertion of any piece of money, coin, or other object, such machine or device is caused to operate or may be operated and if the user, by reason of any element of chance or of any other outcome of such operation unpredictable by him or her, may:

(a) Receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value or which may be given in trade.

§ 849.16, Fla. Stat. (2010) (emphasis added).

The emphasis added to the above section highlights the three main elements needed to find that an arcade is in violation of this statute: (1) insertion of money, coin, or other object to operate the machine, (2) receipt of something of value or something that can be redeemed for various items of value, and (3) an element of chance or unpredictability of the game.

First, if the machines at the arcade operate by the insertion of tokens or a card which has monetary value encoded into it. The encoded card or tokens are purchased by patrons. The encoded card or tokens most likely would be considered "money" or "coin[s]" under the statute, but would definitely qualify as "other object[s]."

Second, those patrons that win any of the games receive vouchers or tickets that can be redeemed within the arcade for drinks, food, or sometimes cash. Even if cash is not

¹ "Whoever by herself or himself, her or his servant, clerk or agent, or in any other manner has, keeps, exercises or maintains a gaming table or room, or gaming implements or apparatus, or house, booth, tent, shelter or other place for the purpose of gaming or gambling or in any place of which she or he may directly or indirectly have charge, control or management, either exclusively or with others, procures, suffers or permits any person to play for money or other valuable thing at any game whatever, whether heretofore prohibited or not, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084." § 849.01, Fla. Stat. (2010).

an option, these tickets would very clearly be considered "memorandum" which "may be exchanged for any . . . thing of value" (i.e., alcoholic drinks or food).

Finally, the game must have an element of chance or unpredictability. Due to its ambiguity, several attorney general opinions and court decisions have shed light on the meaning of the phrase "by reason of any element of chance." In 2007, Attorney General Bill McCollum opined that "if the receipt of a prize is dependent on any element of chance, the machine would fall within the . . . definition of a slot machine proscribed by section 849.15, Florida Statutes." Op. Att'y Gen. Fla. 07-48, at 2 (2007); see also Op. Att'y Gen. Fla. 04-12, at 1 (2004) (Attorney General Charlie Crist asserting the same thing); Op. Att'y Gen. Fla. 98-07, at 2 (1998) (Attorney General Robert Butterworth). Thus, an element of chance is necessary for a machine to fall under the prohibition of the above statutes.

While different Attorney Generals have affirmed the necessity of an element of chance, several court decisions have detailed the difference between games of skill and chance, along with how much chance is required for a machine to be prohibited under sections 849.15–16, Florida Statutes. Courts have determined that as long as an element of chance is inherent in the game itself, that machine can fall under the prohibition of section 849.15, Florida Statutes. For example, in Deeb v. Stoutamire, the Florida Supreme Court opined as follows:

Certainly the outcome of any game at all dependent upon the exercise of human skill is essentially unpredictable. If this were not so, match games like golf and trap shooting would really be dreary, monotonous affairs. It seems to us that inasmuch as the machine itself is on trial, so to speak, it should not be condemned unless this element of unpredictability is inherent in it.

53 So. 2d 873, 874 (Fla. 1951) (emphasis added). In that case, the Court held that mechanical bowling games were not prohibited by the statute even though there was some small amount of unpredictability, because the unpredictability stemmed from the human element of the game, not the game itself. Id. at 875. Therefore, the machine itself must have some amount of inherent unpredictability or chance in order to be prohibited.

In a 1997 opinion, Florida's 4th District Court of Appeals analyzed the skill/chance dichotomy in light of the Deeb decision. In that case, the machines in question were "much like a typical slot machine requiring the player to match up bars, fruit, bells or cherries in a row in order to win more points." State, Dep't of Bus. and Prof'l Regulation, Div. of Alcoholic Beverages and Tobacco v. Broward Vending, Inc., 696 So. 2d 851, 851 (Fla. 4th DCA 1997). The trial court had held that the machines did not violate the statute because "skill was a significant factor in operating and winning on the machines in question." Id. The court reversed, holding that "[w]hile skill will significantly

improve the player's winning percentage, it does not eliminate the element of chance in the machine itself." Id. at 852. The machines in question were programmed to allow the patron to win 55% of the time, and the patron could increase his or her chances of winning by manipulating the lever. Id. The court determined that the slot machine in this case was completely different than the bowling game in Deeb, and that an element of chance was inherent in the game itself. Id. Thus, a machine does not have to completely rely on chance, and chance does not even have to be a majority element, in order to be prohibited by the statute. As long as there is some amount of chance inherent in the game itself, it will be prohibited.

In a more recent decision, another Florida court determined that similar machines were prohibited under section 849.15, Florida Statutes. In State v. Cyphers, an arcade center had machines that "operated by the player's inserting cash into the machine and depressing a button, whereby a series of rotating icons begin to spin. The player then depresses the button to stop the spinning icons, attempting to line up the icons in combinations to be awarded credits." 873 So. 2d 471, 472 (Fla. 2d DCA 2004). Although the court did not specifically analyze whether these machines were prohibited under section 849.15, the defendants in that case admitted that the machines fell under the prohibition, but argued that they met an exemption contained in Fla. Stat. section 849.161(a)(1)(a). Id. at 473. The court held that they did not meet the requirements for the statutory exemption, and thus the machines were prohibited under state law. Id.

Conclusion

Based on the foregoing court decisions and attorney general opinions, arcades with slot machines or the Internet Cafes which use encoded cards with a cash value are likely to be contrary to Florida law. This assumes the machines operate by the insertion of an object, such as a cash encoded card or a token; that they entitle any winner to a voucher, cash or ticket that can be exchanged for something of value; and the machines operate with an inherent element of chance or unpredictability. The requirement of skill is an ambiguous area and would require a factual investigation of the premises in question to determine if it meets this aspect of Florida Statutes. Arcades which contain slot machines, or Internet Cafes would likely be in violation of criminal statutes. In such cases local law enforcement and the State Attorney would presumably enforce the applicable statutes. See Op. Att'y Gen. Fla. 07-48, at 1 (2007). Operators of these facilities have been very aggressive in securing vacant space in failing shopping centers. According to the Attorney for North Palm Beach and Juno Beach that is what led those commissions to enact moratoriums. The Commission may want to consider a moratorium so that staff can prepare an appropriate ordinance to ban such facilities.

Upon First Reading this 19 day of October, 2011, the foregoing Ordinance, was offered by Vice-Mayor Rumsey, who moved its approval. The motion was seconded by Commissioner Hockman and being put to a vote, the result was as follows:

	AYE	NAY
MAYOR JAMES DUBOIS	<input checked="" type="checkbox"/>	<input type="checkbox"/>
VICE-MAYOR KENDALL RUMSEY	<input checked="" type="checkbox"/>	<input type="checkbox"/>
COMMISSIONER STEVEN HOCKMAN	<input type="checkbox"/>	<input checked="" type="checkbox"/>
COMMISSIONER JEANINE LONGTIN	<input type="checkbox"/>	<input checked="" type="checkbox"/>
COMMISSIONER TIM STEVENS	<input checked="" type="checkbox"/>	<input type="checkbox"/>


PUBLISHED IN THE PALM BEACH POST THIS 23 DAY OF October, 2011

Upon Second Reading this 2 day of November, 2011, the foregoing Ordinance, was offered by Vice-Mayor Rumsey, who moved its adoption. The motion was seconded by Commissioner Stevens and being put to a vote, the result was as follows:

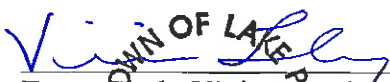
	AYE	NAY
MAYOR JAMES DUBOIS	<input checked="" type="checkbox"/>	<input type="checkbox"/>
VICE-MAYOR KENDALL RUMSEY	<input checked="" type="checkbox"/>	<input type="checkbox"/>
COMMISSIONER STEVEN HOCKMAN	<input checked="" type="checkbox"/>	<input type="checkbox"/>
COMMISSIONER JEANINE LONGTIN	<input type="checkbox"/>	<input checked="" type="checkbox"/>
COMMISSIONER TIM STEVENS	<input checked="" type="checkbox"/>	<input type="checkbox"/>

The Mayor thereupon declared **Ordinance No. 07-2011** duly passed and adopted this 2 day of November, 2011.

TOWN OF LAKE PARK, FLORIDA


BY: 
Mayor, James DuBois

ATTEST:


Town Clerk, Vivian Lemley
(Town Seal)

FLORIDA

Approved as to form and legal sufficiency:


Town Attorney, Thomas J. Baird

THE PALM BEACH POST
Published Daily and Sunday
West Palm Beach, Palm Beach County, Florida

PROOF OF PUBLICATION

STATE OF FLORIDA
COUNTY OF PALM BEACH

Before the undersigned authority personally appeared **Ellen Sanita**, who on oath says that she is **Call Center Revenue Manager** of The Palm Beach Post, a daily and Sunday newspaper, published at West Palm Beach in Palm Beach County, Florida; that the attached copy of advertising for a **Notice** in the matter, **Ordinance 07-2011** was published in said newspaper in the issues of **October 23, 2011**. Affiant further says that the said The Post is a newspaper published at West Palm Beach, in said Palm Beach County, Florida, and that the said newspaper has heretofore been continuously published in said Palm Beach County, Florida, daily and Sunday and has been entered as second class mail matter at the post office in West Palm Beach, in said Palm Beach County, Florida, for a period of one year next preceding the first publication of the attached copy of advertisement; and affiant further says that she/he has neither paid nor promised any person, firm or corporation any discount rebate, commission or refund for the purpose of securing this advertisement for publication in the said newspaper. Also published in Martin and St. Lucie Counties.

④

Sworn to and subscribed before 24th day of October, A.D. 2011.
Who is personally known to me.

A. M. Hinton

NOTARY PUBLIC-STATE OF FLORIDA
Karen M. McLinton
Commission #DD832672
Expires: NOV. 15, 2012
BONDED THRU ATLANTIC BONDING CO., INC.

NO. 6321852
LEGAL NOTICE OF
PROPOSED ORDINANCE
TOWN OF LAKE PARK
Please take notice that on Wednesday,
November 2, 2011, on second reading
for adoption, immediately following the
CRA Board Meeting, which will begin at
6:30 p.m., the Town Commission of the
Town of Lake Park, Florida in a regular
session to be held in the Commission
Chambers, Town Hall, 535 Park Avenue,
Lake Park, Florida will consider the fol-
lowing Ordinance:
ORDINANCE NO. 07-2011
AN ORDINANCE OF THE TOWN COM-
MISSION OF THE TOWN OF
LAKE PARK, FLORIDA, DECLARING
ZONING IN PROGRESS AND A MORA-
TORIUM AS TO THE FILING AND/OR
RECEIVING OF ANY PETITION FOR
THE ESTABLISHMENT OF ADULT
ARCADES OR INTERNET CAFE USES
WITHIN THE TOWN; PROVIDING THAT
ZONING IN PROGRESS AND THE
MORATORIUM SHALL BE IN EFFECT
FOR A PERIOD WHICH SHALL TERMI-
NATE ON THE EFFECTIVE DATE OF
THE TOWN'S ADOPTION OF LAND
DEVELOPMENT REGULATIONS TO
REGULATE THE USE OF ADULT
ARCADES OR INTERNET CAFES; PRO-
VIDING FOR LEGISLATIVE FINDINGS,
INTENT AND PURPOSE; PROVIDING
FOR A DEFINITION OF THE USE OF
ADULT ARCADES OR INTERNET
CAFES FOR THE PURPOSES OF THIS
ORDINANCE; PROVIDING FOR THE
BOUNDARIES SUBJECT TO THE
MORATORIUM; PROVIDING FOR SEV-
ERABILITY; PROVIDING FOR THE
REPEAL OF LAWS IN CONFLICT; AND
PROVIDING FOR AN EFFECTIVE DATE.
If a person decides to appeal any deci-
sion made by the Town Commission
with respect to any hearing, they will
need a record of the proceedings and
for such purpose may need to ensure
that a verbatim record of the proceed-
ings is made, which record includes the
testimony and evidence upon which the
appeal is to be based. For additional
information, please contact Vivian M.
Lemley, Town Clerk at 561-881-3311.
Vivian M. Lemley, Town Clerk
Town of Lake Park, Florida
PUB: The Palm Beach Post
October 23, 2011

THE PALM BEACH POST
Published Daily and Sunday
West Palm Beach, Palm Beach County, Florida

PROOF OF PUBLICATION

STATE OF FLORIDA
COUNTY OF PALM BEACH

Before the undersigned authority personally appeared **Ellen Sanita**, who on oath says that she is **Call Center Revenue Manager** of The Palm Beach Post, a daily and Sunday newspaper, published at West Palm Beach in Palm Beach County, Florida; that the attached copy of advertising for a Notice in the matter **Ordinance 08-2011 & Resolution 41-11-11** was published in said newspaper in the issues of **October 27, 2011**. Affiant further says that the said The Post is a newspaper published at West Palm Beach, in said Palm Beach County, Florida, and that the said newspaper has heretofore been continuously published in said Palm Beach County, Florida, daily and Sunday and has been entered as second class mail matter at the post office in West Palm Beach, in said Palm Beach County, Florida, for a period of one year next preceding the first publication of the attached copy of advertisement; and affiant further says that she/he has neither paid nor promised any person, firm or corporation any discount rebate, commission or refund for the purpose of securing this advertisement for publication in the said newspaper. Also published in Martin and St. Lucie Counties.

(Signature)

Sworn to and subscribed before the 27th day of October, 2011.
Who is personally known to me.

(Signature)

NOTARY PUBLIC-STATE OF FLORIDA
Karen M. McLinton
Commission #DD832672
Expires: NOV. 15, 2012
BONDED THRU ATLANTIC BONDING CO., INC.

NO.6327221R

LEGAL NOTICE OF PRO
CHANGE: PUBLIC HEARIN
REZONING ORDINANC
SITE PLAN RESOLUTI
TOWN OF LAKE PA

Please take notice that on Monday, November 14, 2011, at 7:30 p.m. the Planning & Zoning Board of Lake Park, Florida in a regular session to Commission Chambers, Town Hall, 535 Park Park, Florida will conduct a public hearing for Rezoning Ordinance for a recommendation Commission.

ORDINANCE NO. 08-2011

AN ORDINANCE OF THE TOWN COMMISSION OF THE TOWN OF LAKE PARK, FLORIDA AMENDING THE TOWN'S OFFICIAL ZONING MAP AND REZONING PROPERTY KNOWN AS MARINA VILLAGE P.U.D. TO PLANNED UNIT DEVELOPMENT ("PUD"); PROVIDING WAIVERS; AND PROVIDING AN EFFECTIVE DATE.



The following Resolution will also be a recommendation to the Town Commission:

RESOLUTION NO. 41-11-

A RESOLUTION OF THE TOWN COMMISSION OF THE TOWN OF LAKE PARK, FLORIDA APPROVING A SITE PLAN APPLICATION FOR MARINA VILLAGE P.U.D.; PROVIDING FOR AN EFFECTIVE DATE.

If a person decides to appeal any decision of the Planning & Zoning Board with respect to this matter, they will need a record of the proceeding. For this purpose may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is based. For additional information, please contact Vivian M. Lemley, Town Clerk at 561-881-3311.

Vivian M. Lemley, Town Clerk
Town of Lake Park, Florida

PUB: The Palm Beach Post
October 27, 2011